IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/04/2003

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THE HONOURABLE MR. JUSTICE V.KANAGARAJ

C.R.P. No.1886 of 1996

K.M.Kannu Gounder .. Petitioner

-Vs-

1. Mahboob Ali Sahib
2. Amanullah .. Respondents

Petition filed under Section 115 of the Code of Civil Procedure
praying for the relief as stated therein.

For Petitioner : Mr.V.Lakshmi Narayanan

For respondent : Mr.R.Selvakumar

:O R D E R

This Civil Revision Petition is directed against the fair and decretal order dated 22.02.1996 made in E.P.No.34 of 1993 in O.S.No.1 64 of 1992 by the Court of Subordinate Judge, Dharmapuri, thereby dismissing the execution petition filed by the petitioner herein who is the decree-holder, without costs.

2. Tracing the history of the case, it comes to be known that the petitioner was the plaintiff in the suit in O.S.No.164 of 1992 on the file of the Court of Subordinate Judge, Dharmapuri, and the same was decreed exparte as prayed for on 16.6.1993, against which, on the part of the respondents, no steps have been initiated to set aside the decree, as a result of which, ultimately, the decree holder, the petitioner herein, has filed the above execution petition with averments that the respondents have house and landed properties worth Rs.1 lakh and that by means of business, they are having an income of Rs.6 0,00 0/= per annum and further that they are having a sum of Rs.50,000/= in cash and that they have the capacity to repay the said amount and in spite of it, since they did not come forward to settle the decree amount for causing the arrest of the respondents and keeping them in detention in the civil prison, the execution petition has been filed.

3. In the counter statement, the respondents would deny the averments of the petition the execution petition and would represent to the effect that they have taken steps to set aside the exparte decree passed against them and that they have no means to settle the decree amount and would

ultimately pray for dismissing the execution petition with costs.

4. The Court of Execution would frame proper points for consideration and examine the case of the execution petition on available materials placed on record and upon hearing the learned counsel for both, would consider the two judgments delivered by this Court and the Apex Court respectively, the first one reported in V.Ganesa Nadar v. K. Chellathai Ammal (AIR 1989 Madras 8), wherein it is held that it is open to the decree-holder to file a petition for attachment and sale of the immovable property. The decree holder in this case has not taken recourse to those provisions. It is obvious that he is utilising the provisions of O.21 and 38 C.P.C. merely as a lever to force payment without taking recourse to the proceedings for attachment and sale of the immovable property and that the petition appeared to be wholly mala fide. The second judgment reported is one in Jolly George Varghese and another v. Bank of Cochin (AIR 1980 SC 470), wherein it is held:

"The words which hurt are "or has had since the date of the decree, the means to pay the amount of the decree." This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Art.11 (of the Covenant) and Art.21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised S.51 with the Covenant and the Constitution.

The question may squarely arise some day as to whether the Proviso to S.51 read with O.21, R.37 is in excess of the Constitutional mandate in Art.21 and bad in part. In the present case since we are remitting the matter for reconsideration, the stage has not yet arisen for us to go into the vires, that is why we are desisting from that essay.

In the present case the debtors are in distress because of the blanket distraint of their properties. Whatever might have been their means once, that finding has become obsolete in view of later happenings. Sri Krishnamurthi Iyer for the respondent fairly agreed that the law being what we have stated, it is necessary to direct the executing court to re-adjudicate on the present means of the debtors vis-avis the present pressures of their indebtedness, or alternatively whether they have had the ability to pay but have improperly evaded or postponed doing so or otherwise dishonestly committed acts of bad faith respecting their assets. The Court will take note of other honest and urgent pressures on their assets, since that is the exercise expected of the Court under the proviso to S.51. An earlier adjudication will bind if relevant circumstances have not materially changed."

5. In consideration of the principles laid down in both the above judgments, particularly that of the Apex Court, since on the part of the petitioner, no proper proof has been produced for the respondents to have had any property, and when he does not have any means to pay the decree amount, there is no point in causing his arrest and thus, giving effect to the judgment of the Apex Court, the trial court would conclude that under Order 21, Rules 37 and 38 C.P.C., he cannot be arrested for the purpose of putting him in the civil prison and would ultimately dismiss the execution petition without costs.

6. Learned counsel appearing on behalf of the petitioner, besides bringing out the facts and circumstances of the case, would also cite an order passed by this Court reported in Chetty v. Rangan {(20 02) 1 MLJ 546} wherein in the case of arrest and detention in the execution proceedings, it has been decided that the decree holder is at liberty to seek for any mode of relief to recover the amounts due. But so far as the choice whether the decree holder could adopt and file execution petition for attachment or for arrest is concerned, in the recent times, it has been arrived at by the upper forums of law that prior to embarking upon arrest, the other procedures kept open, such as attachment, etc. should be exhausted.

7. Moreover, in adherence to the Apex Court judgment reported in Jolly George Varghese v. Bank of Cochin (cited supra), if a judgment is to be rendered in the above revision petition, it should be held that since no source of income or cash in hand of the respondents as been brought forth on the part of the petitioner, particularly, when the respondents deny that they have any means to repay the decree amount and further since the Court of Execution has arrived at the right conclusion to dismiss the application, the interference of this Court sought to be made into the fair and decretal order of the Execution Court, which is well considered and merited, is neither necessary nor warranted in the circumstances of the case.

In result, the above civil revision petition is without merit and the same is dismissed as such. No costs.

The fair and decretal order dated 22.02.1996 made in E.P.No.34 of 1 993 in O.S.No.164 of 1992 by the Court of Subordinate Judge, Dharmapuri, is confirmed.

Index : Yes.
Website : Yes.
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To
The Subordinate Judge
Dharmapuri.

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